

Shelly Bosser

BEFORE THE MERIT EMPLOYEE RELATIONS

BOARD OF THE STATE OF DELAWARE

COPY

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	)	
APPELLANT,	)	
	)	
v.	)	MERB DOCKET NO. 02-01-250
	)	
DELAWARE DEPARTMENT	)	DECISION AND ORDER
OF TRANSPORTATION,	)	
	)	
AGENCY.	)	

**PUBLIC DECISION**  
**PURSUANT TO 29 DEL. C. § 1004(b)(4) AND**  
**29 DEL. C. § 5948**

BEFORE Brenda Phillips, Chairperson, John F. Schmutz, John W. Pitts, and Dallas  
Green consisting of a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §  
5908(a).

**APPEARANCES**

**For the Appellant:**

Roy S. Shiels, Esquire  
Brown, Shiels, Beauregard & Chasanov  
108 E. Water Street  
P.O. Drawer F  
Dover, DE 19903

**For the Agency:**

Ilona M. Kirshon, Esquire  
Deputy Attorney General  
Carvel State Office Building  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, DE 19801

**BACKGROUND**

This matter is before the Merit Employee Relations Board ("MERB" or "Board") on  
appeal from a third step grievance decision adverse to the Grievant pursuant to Merit Rule 20.9.

The Appellant contends that the Department of Transportation ("Del Dot") demoted and  
transferred her from her position at Del Dot without just cause in violation of Merit Rule 15.1.

The Board scheduled this matter for an evidentiary hearing that began on Thursday,

November 7, 2002.

The Appellant elected to have her hearing conducted as a private disciplinary hearing and therefore, pursuant to 29 Del. C. § 10004(b)(8), the Board unanimously voted to enter into executive session to conduct the hearing. All witnesses were sequestered and the Agency proceeded as the moving party under Merit Rule No. 21.0230.

The State completed the presentation of its witnesses on November 7, 2002 and the hearing was adjourned to the next available date of November 21, 2002 for the presentation of the Appellant's witnesses.

This is the public version of the decision and order of the Board that, for the reasons stated below, denies the appeal and upholds the disciplinary action of the appointing authority. This is the public version of the Decision and Order. A non-public version that identifies the Appellant and the witnesses, and summarizes the testimony has been issued to the parties only.

### **RELEVANT MERIT RULE**

#### **MERIT RULE NO. 15.1**

Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. 'Just cause' means that the management has sufficient reasons for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and
- imposing a penalty appropriate to the circumstances.

### **FINDINGS OF FACT AND DISCUSSION**

The ultimate issue presented for determination is whether or not the department had just cause for demoting Appellant from the position of toll sergeant to toll collector and for transferring Appellant to a different toll facility. By law, the disciplinary decision of the appointing authority is presumptively correct. Hopson v. McGinnis, 391 A.2d 187 (Del. Super. 1978). Therefore, in order to prevail on appeal, Appellant must show by a preponderance of the evidence that the department did not have just cause for the disciplinary action taken. The members of the Merit Employees Relations Board hearing in this matter are unanimous in their determination that Appellant has not met her burden.

Just cause under Rule 15.1 requires finding that the employee committed the charged offense, that due process rights were afforded, and that the penalty imposed was appropriate to the circumstances. The Board finds that the evidence presented establishes that all three elements of Rules 15.1 were met.

#### **The Offenses Charged**

In finding that Appellant committed the offenses charged, the Board evaluated the credibility of the testimony given by the various witnesses presented by the Appellant and by the State. The Board found the testimony of the State's witnesses credible in establishing that Appellant participated in and condoned an environment in which sexual discussion, conduct and innuendo were permitted.

#### **Due Process**

There is no real dispute with regard to the second element of Merit Rule 15.1. An

investigation was conducted by the agency. Appellant waived her right to a pre-determination and proceeded with her grievance. The Board concludes that Appellant has been afforded the due process rights specified under the Merit Rules.

### **Appropriateness of the Penalty**

The third element of Merit Rule 15.1 requires a finding that the penalty imposed by the agency was appropriate to the circumstances. The Board engaged in extensive discussion concerning the disciplinary action before unanimously agreeing that the penalty imposed was appropriate.

The totality of the evidence discloses the existence of what can fairly be described as a lax atmosphere at the toll plazas concerning sexual comments and jokes. The lax or permissive atmosphere does not serve as a defense to the allegations against Appellant; rather, it serves to further support the likelihood that Appellant behaved as alleged. As a supervisor she was responsible for stopping the inappropriate behavior. She testified that she was aware of the agency's policies with regard to workplace standards of behavior and understood that a violation of those policies could lead to discipline up to and including termination. Yet she participated in and condoned an environment in which sexual discussion, conduct and innuendo were permitted.

A demotion of 2 levels appears harsh at first glance, however, any demotion less than 2 levels would have left Appellant in a supervisory position. Appellant participated in the conduct and failed to take appropriate action to stop the behavior of subordinate employees. As a supervisor she should have brought the behavior to a halt and reported it to her superiors. She did neither and failed in her supervisory duties. The Board, therefore, concludes that Appellant's conduct and failure to act warrant the demotion from a supervisory position and the transfer to a

different toll plaza.

### CONCLUSIONS

Based upon the evidence presented, the Board unanimously concludes that the Appellant has failed to meet her burden to establish the absence of just cause for her demotion and transfer.

The Board unanimously concludes that the disciplinary action of the Appointing Authority should be upheld and the appeal denied.

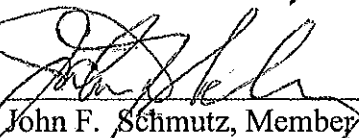
### ORDER

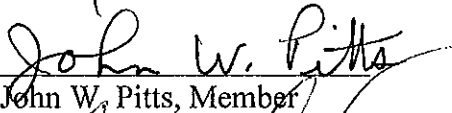
For the reasons stated above, the appeal is denied and the action of the Appointing Authority is upheld.

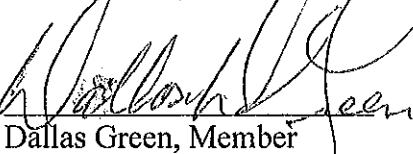
**IT IS SO ORDERED.**

**BY ORDER OF THE BOARD** this 3<sup>rd</sup> day of April, 2003.

  
Brenda Phillips, Chairperson

  
John F. Schmutz, Member

  
John W. Pitts, Member

  
Dallas Green, Member

## APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: April 3, 2003

Distribution:

Original: File

Copies: Grievant's Counsel

Agency Counsel

Board Members

Board Counsel